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No. 25

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ADAMS DAIRY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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No. 741.

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v.

ADAMS DAIRY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Appeals is reported at 322 Fed. 2d 553 (Appendix A, p. 13 of Petition). The Findings of Fact, Conclusions of Law and Order of the Board (R. 2-28) are reported at 137 NLRB 815.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

1. Does an employer who in three successive labor agreements has repeatedly refused the Union's demands

at its plant to independent distributors, violate Section 8 (a) (5) and (1) of the National Labor Relations Act when, motivated solely by economic and financial reasons, it abandons the delivery phase of its business without further bargaining about that decision with the Union representing his employees?

2. If the above question is answered in the affirmative, may the Board as a remedy for such a refusal to bargain order the employer to reinstate the former driver employees to their former jobs and award them back pay for all time lost even though the company during that period no longer offered delivery service to its customers?

STATUTE INVOLVED.

The relevant portions of the National Labor Relations Act as amended are: 29 U. S. C. A. 158 (d) (1) and (5) which are set forth in Petitioner's Brief, p. 33.

STATEMENT.

A. Facts of Case.

This litigation arises out of a decision of Respondent Adams Dairy, Inc., to stop the delivery of milk to its wholesale customers and to sell all of its products from the delivery dock at its plant. This decision led to the sale of all of its delivery equipment and the termination of employment of all drivers. The former employees then brought unfair labor charges against the Company.

The Company, since 1947, engaged in the business of processing and selling milk and dairy products exclusively at wholesale to stores from its plant in St. Louis, Missouri (R. 87). From the time it began business all its employees were represented by labor Unions. Originally, the plant inside workers, the office help and the drivers, were represented by Teamsters, while the plant engineers

were represented by Operating Engineers. From 1947 until 1954, successive labor contracts were entered into with these Unions for these classifications of employees (R. 72, 73). In 1954, the driver employees in an NLRB election selected the Independent Wholesale Dairy Products Salesmen Association (R. 73), to represent them in collective bargaining. From that date the Company entered into successive labor contracts with the new Union for its drivers and with the Teamsters and the Operating Engineers for the rest of the employees.

Until 1952, the Company by driver employees distributed its products in the City of St. Louis and in St. Louis County and a small territory in Illinois (R. 74). Starting in 1952, the Company began selling milk and dairy products to independent distributors at the Company's dock. These distributors resold the products to stores located outside of the City of St. Louis and St. Louis County and one distributor started selling to the customers of the one driver employee who had previously delivered in Illinois (R. 74). By the year 1958, there were some ten distributors (R. 92) who were buying milk dockside for resale and more than twenty driver employees delivering milk for the Respondent.

The limitation of dockside sales to independent distributors was a subject of bargaining in the three successive contracts with the independent drivers' Union since 1954 (R. 103, 104, 105). In 1954, the Union presented as one of its demands a restriction on the sale of milk by independent distributors in those areas served by employee drivers. This demand was refused by the Company and not included in the Contract. During that Contract term, one of the Company's customers started to pick up its purchases at the Company dock. The driver who passed this customer's place of business on his route filed a grievance claiming a commission on these sales. This

grievance was referred under the terms of the Contract to an arbitrator who supported the Company's position that it had the right to sell to anyone it desired at dockside. The arbitrator stated that there was "Nothing in the Contract between these parties which limits or in any other way prohibits the Company from exercising its management prerogative in making such dockside sales without paying commissions to driver salesmen" (R. 145-146, Res. Ex. 5).

When negotiating the 1956 labor contract the Union presented a written proposal which would limit sales at dockside (R. 104, Res. Exh. 4, R. 139, Article XVI). The demand was negotiated and refused by the Company, and the Union agreed to a contract without this proposed provision.

The 1956 contract expired in 1959. Again the Union presented a demand limiting dockside sales, requesting that all routes remain company delivery routes and that independent distributors be limited to sell only in territories where there were no company deliveries (R. 83). Again the Company refused this demand and the Union acquiesced by signing in September, 1959, a contract without this clause.

Starting in November, 1959, the Company called a series of three meetings, the last one in December (R. 50): The Company's purpose in calling these meetings was to present its problem of exorbitant delivery costs. The existing labor contract called for the route drivers to be paid a commission on each unit of milk or dairy product sold. The Company's customers were for the most part large supermarkets and the eighteen driver employees who were regular route drivers were paid on the average $14,495.00 per year for working a 32 to 38 hour week (R. 88). The Company claimed that it was not in a competitive position because of its high delivery costs. It requested the Union

to reconsider the commission schedule in order to make the Company competitive. At the meetings the Union indicated that it would give the subject consideration. But the Union then held a meeting of its members and voted that they were determined to ". . . stay with the Contract as it was signed in September" (R. 82).

On February 22, 1960, the General Manager of the Company, E. C. Adams, called a meeting with the Union President and the Union Treasurer (R. 76-77). He informed the Union Representatives that he had talked to a number of men who were interested in becoming independent distributors and that he was going to talk to more men so that all driver employees should check with their supervisors before going on their routes the next day (R. 90). After that, independent distributors were purchasing the entire supply of dairy products and there was no need for driver employees.

At about 11:00 a. m., Wednesday, February 24, 1960, two days after the Company meeting with the Union President and Treasurer, the Union requested a meeting with the Company. The Company agreed to meet that day at 1:30 p. m. (R. 80). At that meeting the Union made no demand whatsoever but merely asked whether the employee drivers were "fired". In response, the Company advised the Union that the drivers were terminated because of the change in method of sales (R. 80).

The Company thereupon terminated the drivers and paid them one weeks' pay (R. 70) and accumulated vacation pay as called for by the labor agreement. (See Article XV, General Counsel Ex. 3, R. 123.)

B. The Decision of Labor Board.

In December, 1960, some ten months after the Company ceased its delivery business, the Trial Examiner made his

intermediate report. In his finding of facts, the Trial Examiner stated:

> "The record is devoid of antiunion statements or attitudes usually present where there is a strong opposition to unions by an employer. Nor is there any pattern of conduct which would support a finding that Respondent was hostile to labor organizations or to the Union in particular.
>
> Moreover, there is also evidence in support of the Respondent's claim that the changeover from delivery by its own driver salesmen to delivery by independent Distributors had an economic motivation" (R. 22).

The Trial Examiner in spite of this finding of facts found violations of Sections 8 (a) (1), (3) and (5) and (d). This decision was promptly appealed to the Board.

On June 25, 1962, twenty-eight months after the acts complained of, the Board handed down its three-man decision. It adopted the findings of fact of the Trial Examiner, but only found violations of Sections 8 (a) (5) and (1), a refusal to bargain in that the Company engaged independent distributors without prior notice to or consultation with the Union. The Board did not pass on the charge of the Section 8 (a) (3) or (d) violation, but applied the remedy of reinstatement and back pay to the Sections 8 (a) (5) violation (R. 4). The remedy the Board prescribed was to require the Respondent to rehire all the employees and make them whole for any loss of earnings during the two and one-half years since the Company discontinued its deliveries.

C. The Court of Appeals Decision.

The Board sought an enforcement order before the Eighth Circuit Court of Appeals. This Court considered the primary issue to be whether it was mandatory for the

Company, despite its purely economic motivation to negotiate and bargain over its decision to eliminate its driver salesmen and discontinue that phase of its business. (Appendix A, Petition for Writ, p. 17). The Court held that "The decision on the part of Adams to terminate a phase of its business and distribute all of its products through independent contractors was not a required subject to collective bargaining" (Appendix A, Petition for Writ, p. 29). The Court held, however, that after the Company had made a decision Section 8 (a) (5) of the Act required it to negotiate with reference to the treatment of the employees who were terminated by the decision. The Court further found that since there were no jobs left that could be affected by the termination, nor were there any other plants of the Company where the employees could be utilized, the only question was whether the employees might be entitled to severance pay. The Court then interpreted the Contract and stated that the employees were entitled to four months' pay plus six per cent interest on this amount since date of termination.

D. Events Since the Court Decision.

Both the Company and the Board filed Petitions for Rehearing. The Board contended the entire decision is in error. The Respondent contended that the Court erroneously interpreted the contract and should not have applied Article XII thereof to termination pay. Both Petitions were denied and the Company then notified the Board that it was willing to carry out the order of the Court (See Appendix A).

On December 23, 1963, the Company entered into a contract to sell all of its operating assets and on January 1, 1964, pursuant to the terms of the contract the Company wholly ceased business operations and is now in the process of corporate liquidation.

ARGUMENT AGAINST GRANTING THE WRIT.

A.

The Petitioner's only argument for the granting of certiorari in this case is that the opinion of the Eighth Circuit is in direct conflict with the decision of the Circuit Court of Appeals for the District of Columbia in **Fibreboard Paper Products Corp. v. National Labor Relations Board, 322 F. 2d 411.** Yet, Petitioner admits that the factual contexts of the two cases are different (R. 9). In the Fibreboard case the Company contracted out its plant maintenance work. Work formerly performed by employees was performed by subcontractors of the employer in the company plant. It is at this point that the first difference in the two cases appears. In the Adams case the Company wholly discontinued its delivery service and sold to distributors instead of to its former customers. The Respondent did not have the work of delivery performed for it or in its behalf as in the case of subcontracting. The distributors on the other hand after the change, bought the dairy products, dockside and realized their profit on resale to their own customers. Respondent after the changeover had no customers other than the independent distributors.

The second distinction between the Fibreboard case and this one is that the Respondent herein had successfully bargained the limitation against direct sales to independent contractors out of the contract. In three successive negotiations leading to labor contracts the Union had given up its demands for such a limitation.

Thus, the question as presented by the Petitioner (Petition, p. 2) does not fairly state the issue when it arbitrarily assumes that there was no bargaining. In the light of the facts as disclosed in the record, the Board

in effect is stating that a Union can force an employer during a Contract year to do that which the Union was unable to accomplish at the bargaining table. The Petitioner (Petition, p. 10), as well as the Board in its decision, admits that there was bargaining on the subject of the independent distributors. But it points out, as if that would make a difference, that in the bargaining sessions and the meetings the company never said specifically that it would get rid of its entire distribution system. Is this not merely a question of degree?

B.

There is nothing in the decision sought to be reviewed that would justify certiorari by this Court. The Eighth Circuit has merely followed the accepted line of authority that it is unnecessary for an employer to bargain with a Union with respect to decisions of management, not restricted by labor contract, and motivated solely by economic considerations. This circuit has adopted the theory that an employer has the right to close permanently or go out of business at any time. **NLRB v. Missouri Transit Co., 250 F. 2d 261 (1957)** and **NLRB v. New Madrid Mfg. Co., 215 F. 2d 908 (1954)**.

The Fifth Circuit passed on this question in 1954 and held that it was not necessary for an employer to bargain with a Union prior to discontinuing a phase of its business. **NLRB v. Houston Chronicle Publishing Co., 211 F. 2d 848 (1954)**. The First Circuit followed this line of authorities in **NLRB v. New England Web. Inc., 309 F. 2d 696 (1962)**, as did the Sixth Circuit in **NLRB v. R. C. Mahon Co., 269 F. 2d 44 (1959)**, and in **NLRB v. Lassing, 284 F. 2d 781 (1960)**, when it was held that a change in operations motivated by financial or economic reasons is not an unfair labor practice under the Act. Late in 1962, the Ninth Circuit in **NLRB v. Servette, 313 F. 2d 67,**

held that a business may change its business methods as long as its intention is not motivated by illegal intention to avoid its obligation under the National Labor Relations Act. The Second Circuit in **NLRB v. Rapid Bindery, Inc., 293 F. 2d 170 (1961)**, held that a Company was under no duty to consult with a Union prior to its decision to move its plant.

The second question presented by the Petitioner involves re-instatement of employees to their former jobs. It had been argued before the Circuit Court of Appeals that the company was no longer in the delivery business and had neither trucks for the employees to drive nor customers for them to serve. Now that the company has sold its plant facilities and is in the process of corporate liquidation the question of re-instatement of drivers becomes moot.

CONCLUSION.

The Petition for the Writ of Certiorari should be denied as the problem presented is not in conflict with the controlling decisions of five other circuits and for the reason that no useful purpose could be served by this Court granting the Writ.

Respectfully submitted,

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J. LEONARD SCHERMER,
SYLVAN AGATSTEIN,
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SHIFRIN, TREIMAN, AGATSTEIN &
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Of Counsel.

February, 1964.

EXHIBIT A.

December 9, 1963

Mr. Walter A. Werner
Fourteenth Region
Compliance Officer
National Labor Relations Board
4459 Federal Building
1520 Market Street
St. Louis, Missouri 63103

Re: N. L. R. B. vs. Adams Dairy, Inc.,
No. 17171, Eighth Circuit Court of Appeals

Gentlemen:

On behalf of our client, Adams Dairy, Inc., please be advised that our client is willing to comply with the requirements as set forth by the Eighth Circuit in their decree in the above styled matter.

According to the Decree, each of the affected employees are owed, "the four months' guaranteed basic pay and commission as provided in the collective bargaining agreement." The facts of the case make the payments made in January, 1960, controlling.

For your information we are enclosing herewith a list of all of the drivers employed by Adams Dairy, Inc., who were involved in the labor charge, together with their commissions earned during January, 1960.

Yours very truly,

Shifrin, Treiman, Agatstein & Schermer,

.....

J. Leonard Schermer.

JLS:kz

Encl.

cc: Adams Dairy, Inc.
Mr. Harry Craig
Mr. Carroll Gilpin